United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

UNITED STATES COURT OF APPEALS
For The District Of Columbia

No. 16,587

132

GEORGE SWENSON, Appellant,

v.

GEORGE P. BARRICK
and
ALLIED AMERICAN MUTUAL FIRE INSURANCE COMPANY,

Appellees.

Appeal From The Municipal Court Of Appeals
For The District Of Columbia

United States Court of Appeals
For the
District of Columbia Circuit
FILED NOV 30 1961
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STATEMENT OF QUESTION PRESENTED

Do those provisions of the District of Columbia Employee Non-Liability Act, 74 Stat. 519, Public Law 86-654, which take from a claimant seeking money damages, arising out of the operation of a District of Columbia emergency vehicle on an emergency run, the right to sue the District employee who operated the vehicle and, upon proof of ordinary negligence, obtain a judgment uncertain of collection and, in exchange therefor, by denying to the District the defense of governmental immunity, give to the claimant the right to sue the District and, upon proof of gross negligence, obtain a judgment certain of collection, unconstitutionally deprive the claimant of a property right if retroactively applied, i.e., to claims arising out of accidents which occurred prior to the effective date of the Act?

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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

GEORGE SWENSON, Appellant,	:	
v.	:	No. 16,587
GEORGE P. BARRICK and ALLIED AMERICAN MUTUAL FIRE INSURANCE COMPANY, Appellees.	:	

JURISDICTIONAL STATEMENT

This Court, by order dated October 6, 1961, has allowed an appeal from the judgment of the Municipal Court of Appeals for the District of Columbia reversing the judgment of the Municipal Court for the District of Columbia in a negligence action. The jurisdiction of the Municipal Court was apparently invoked under Section 4 of the Act of April 1, 1942, 56 Stat. 192, ch. 207 (D. C. Code, 1951, § 11-755). The judgment of the Municipal Court was entered on October 11, 1960 (J. A. 7). Notice of appeal therefrom was filed October 14, 1960 (J. A. 8). The Municipal Court of Appeals had jurisdiction under Section 7 of the Act of April 1, 1942, supra (D. C. Code, 1951, § 11-772). The judgment of the Municipal Court of Appeals was entered on August 17, 1961 (J. A. 11). Petition for allowance of an appeal

from the judgment of the Municipal Court of Appeals was filed in this Court on Monday, August 28, 1961. This Court has jurisdiction under Section 8 of the Act of April 1, 1942, supra, (D. C. Code, 1951, § 11-773).

STATEMENT OF THE CASE

On January 18, 1959, a District of Columbia Fire Department ambulance, while "on an emergency run" transporting a "heart patient," skidded on an icy section of the roadway and collided with a parked automobile owned by appellee Barrick and insured by appellee Allied American Mutual Fire Insurance Company (J. A. 1-2, 9-10). Appellees, on September 23, 1959, sued appellant, the driver of the ambulance, in the Municipal Court alleging that the collision was caused by appellant's negligence (J. A. 1-2).

When, on October 5, 1960, the case came on for trial, appellant moved, pursuant to the District of Columbia Employee Non-Liability Act, 74 Stat. 519, Public Law 86-654, which had become effective August 14, 1960, to substitute the District of Columbia as a defendant in his stead (J. A. 6, 9). The motion was granted, over appellees' objection, and the case proceeded to trial against the District of Columbia only (J. A. 7, 9).

At the conclusion of the evidence, the Municipal Court directed a verdict in favor of the District of Columbia on the ground that appellees had failed to prove gross negligence as required by the District of Columbia

Employee Non-Liability Act (J. A. 7, 10-11).

Appellees appealed to the Municipal Court of Appeals, assigning as error the dismissal of their complaint against appellant (J. A. 8).

The Municipal Court of Appeals held that:

> As the effect of the D. C. Employee Non-Liability Act is to retroactively divest appellants [appellees here] of their common-law right of action to recover against the ambulance driver on proof of ordinary negligence and allows recovery against the District of Columbia only on proof of gross negligence, we are forced to declare that the Act in its application to the facts of this case results in an unconstitutional deprivation of appellants' property right. * * * (J. A. 19)

STATUTE INVOLVED

The District of Columbia Employee Non-Liability Act, 74 Stat. 519, Public Law 86-654, a copy of which is annexed hereto as Appendix A.

SUMMARY OF THE ARGUMENT

Because the District of Columbia Employee Non-Liability Act, by denying to the District of Columbia the defense of governmental immunity, gives to appellees the right to sue the District and, upon proof of gross negligence, obtain a judgment certain of collection, a right equal to or superior to the right, abrogated by the Act, to sue the District employee and, upon proof of ordinary negligence, obtain a judgment uncertain of collection,

the Act, as applied to the facts of this case, does not result in an unconstitutional deprivation of appellees' property rights.

ARGUMENT

The District of Columbia Employee Non-Liability Act is constitutional.

The sole question here presented is whether the District of Columbia Employee Non-Liability Act, 74 Stat. 519, Public Law 86-654, as applied to the facts of this case, results in an unconstitutional deprivation of appellees' property rights.

Prior to August 14, 1960, the effective date of the District of Columbia Employee Non-Liability Act, the doctrine of governmental immunity frequently barred the maintenance of a suit against the District of Columbia for damage to property or for personal injury or death resulting from the operation of a District vehicle. See, e.g., Loube v. District of Columbia, 67 App. D. C. 322, 92 F.2d 473 (1937); District of Columbia v. May, 63 App. D. C. 10, 68 F.2d 755 (1933). There was, of course, no such bar to the maintenance of an action against the District employee who operated the vehicle and, upon proof of ordinary negligence, a judgment could be obtained against him.

The District of Columbia Employee Non-Liability Act provides that, after its effective date, the District of Columbia may not assert

> * * * the defense of governmental immunity in any suit at law in which a claim is asserted against it for money only on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the District occurring as the result of the operation by such employee, within the scope of his office or employment, of a vehicle owned or controlled by the District: Provided, That in the case of a claim arising out of the operation of an emergency vehicle on an emergency run the District shall be liable only for gross negligence. * * * (Sec. 3)

The Act provides further that, after its effective date,

> * * * no civil action or proceeding shall be brought or be maintained against an employee of the District for loss of or damage to property or for personal injury, including death, resulting from the operation by such employee of any vehicle if * * * the employee was acting within the scope of his office or employment, * * *. If in any such civil action or proceeding pending in a court in the District of Columbia as of the effective date of this Act the District has not been named as a defendant, said District shall be joined as a defendant and * * * the action shall be dismissed as to the employee and the case shall proceed as if the District had been a party defendant from the inception thereof. (Sec. 6)

Thus the Act, while immunizing from suit District employees acting within the scope of their office or employment, requires a person asserting a claim for damage to property or for personal injury or death resulting

from the operation of a District vehicle to sue the District and, upon a determination of liability, permits recovery notwithstanding the doctrine of governmental immunity. A very real advantage is thus conferred upon a claimant for, if a judgment is obtained against the District, it is certain to be collectible. No such certainty attaches to a judgment obtained against the District employee who operated the vehicle involved because it may well be that he will be without sufficient assets to satisfy the judgment and his salary is not subject to attachment. Accordingly, in all cases except those involving an emergency vehicle on an emergency run, the Act, for all practical purposes, gives to a claimant something of real value which he did not previously have, while taking from him nothing of value which he had prior to the effective date of the Act.

In cases involving an emergency vehicle on an emergency run (such as that involved here), the Act, while conferring upon the claimant a most valuable advantage, i.e., the right to sue and recover from the District, imposes upon him the requirement which, prior to the effective date of the Act, he would not have had in a suit against the District employee, that of proving gross negligence. It is this provision of the Act which the Municipal Court of Appeals has held violative of the constitution if retroactively applied.

The material facts of this case are clear and undisputed. The accident happened on January 18, 1959, and the complaint was filed on September 23, 1959. While the case was awaiting trial, the Congress enacted the District of Columbia Employee Non-Liability Act which became effective August 14, 1960. Accordingly, when on October 5, 1960, the case was called for trial, the District of Columbia was joined as a defendant and the complaint against appellant, the operator of the ambulance, was dismissed. In order to prevail on their complaint against the District, appellees were required to prove gross negligence, which they were unable to do.

In its opinion the Municipal Court of Appeals recognizes the well established rule that "* * * the presumption is that a statute will not be applied retroactively unless the legislature has clearly indicated that it should have a retroactive effect." It concludes, however, that "* * * to interpret the D. C. Employee Non-Liability Act in a prospective manner only would distort the clear significance of its words. The Act is not written in a way that allows this Court to deny that it was intended to be retroactive * * *."

The Municipal Court of Appeals concedes that "* * * retroactivity by itself does not make a statute invalid. Indeed, vested rights sometimes

may be reached by retrospective legislation that is enacted as a reasonable exercise of the police power. Speert v. Morgenthau, 73 App. D. C. 70, 74, 116 F.2d 301, 305."

And in Leedom v. International Brotherhood of Electrical Workers, 1960, 107 U. S. App. D. C. 357, 360, 278 F.2d 237, 240, Judge Bazelon said:

> * * * Indeed the modern trend is to scrutinize more and more carefully the substance of the "vested rights" which have often been asserted in condemnation of retroactive legislation. (Citing many cases.)

The Municipal Court of Appeals holds, nevertheless, that the application of the District of Columbia Employee Non-Liability Act to the facts of this case offends the general rule that "* * * retroactive laws are unconstitutional if they disturb or destroy existing vested rights * * *."

The vice of the Municipal Court of Appeals' ruling is its conclusion that the Act, as here applied, destroyed appellees' right to recover damages for the loss of their property. Had the Act taken from appellees such right and given nothing in return it might well be unconstitutional. But, plainly, that is not the situation here. While the Act took from appellees the right to sue appellant and, upon proof of ordinary negligence, obtain a judgment uncertain of collection, it, at the same time, by denying to the District of Columbia the defense of governmental immunity, gave to appellees the

right to sue the District and, upon proof of gross negligence, obtain a judgment certain of collection. This, as previously pointed out, is a most valuable right. Plainly, the Congress, in enacting the legislation, determined that the benefit conferred fully compensated for the right denied. The Municipal Court of Appeals disagrees with this Congressional determination and holds the Act unconstitutional.

The authorities cited by the Municipal Court of Appeals in support of its opinion are clearly distinguishable. In Weil v. Taxicabs of Cincinnati, 1942, 139 Ohio St. 198, 39 N. E. 2d 148, the court held that the Workmen's Compensation Act involved, if retroactively applied, would extinguish a vested common-law action for damages for personal injuries and was therefore unconstitutional because the right to compensation given by the Act was of such different kind and nature that the benefits conferred did not make up for the right destroyed. But, as has been shown, that is not the situation here.

Other cases relied upon by the Municipal Court of Appeals, Hammack v. Monroe Street Lumber Company, 1959, 54 Wash. 2d 224, 339 P. 2d 684; Field v. Witt Tire Co. of Atlanta, Ga., 1952, 2d Cir., 200 F. 2d 74; Martin v. Sasgen Derrick Company, 1960, 22 Conn. Sup. 219, 166 A. 2d 862; Michaud v. Fitzryk, 1961, 148 Conn. 447, 171 A. 2d 397, do

no more than reiterate the well established rule that "* * * legislation is not to be applied retroactively unless the legislation unequivocally expresses a contrary intent," especially where retroactive application would present constitutional questions. In each of these cases the legislation involved was held to be prospective only in its application and, accordingly, to be constitutional.

In Chase Securities Corporation v. Donaldson, 1945, 325 U. S. 304, and Ogdon v. Gianakos, 1953, 415 Ill. 591, 114 N.E.2d 686, also cited by the Municipal Court of Appeals, the legislation in question was held to effect procedural rights only and, accordingly, to be constitutional.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the District of Columbia Employee Non-Liability Act is, as applied to the facts of this case, constitutional, and that the judgment of the Municipal Court of Appeals should, accordingly, be reversed.

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APPENDIX A

Public Law 86-654
86th Congress, S. 3616
July 14, 1960
74 Stat. 519

AN ACT

To deny to the District of Columbia, in suits on claims arising out of the negligent operation of vehicles owned or controlled by it and operated by its employees in the performance of their official duties, the defense of governmental immunity, to relieve such employees of liability in such cases to third persons, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "District of Columbia Employee Non-Liability Act."

Sec. 2. As used in this Act the term --

(a) "Commissioners" means the Commissioners of the District of Columbia, or their designated agent.

(b) "Court" means either the United States District Court for the District of Columbia or the Municipal Court for the District of Columbia, depending upon the amount involved in an action under the authority of this Act as related to the limits of jurisdiction of the said courts.

(c) "District" means the Government of the District of Columbia, a municipal corporation.

(d) "Emergency run" means the movement of a District-owned vehicle, by direction of the operator or of some other authorized person or agency, under circumstances which lead the operator or such person or agency

to believe that such vehicle should proceed expeditiously upon a particular mission or to be a designated location for the purpose of dealing with a supposed fire or other emergency, an alleged violation of a statute or regulation, or other incident requiring emergency action, or the prompt transportation to a place of treatment or greater safety of an alleged sick or injured person.

(e) "Emergency vehicle" means a vehicle assigned (1) to the Fire Department of the District or to the Metropolitan Police Department and not designated by the Commissioners as a nonemergency vehicle; or (2) to other departments or officials of the District and designated by the Commissioners as an emergency vehicle .

(f) "Employee" means a person serving as an officer or employee of the District, whether or not paid by the District, or a person formerly so engaged, or the representative of a deceased officer or employee of the District.

(g) "Vehicle" means every type of conveyance or machine capable of movement on land, or in water or air, including an animal being ridden and any animal-drawn machinery or conveyance.

Sec. 3. Hereafter the District of Columbia shall not assert the defense of governmental immunity in any suit at law in which a claim is asserted against it for money only on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the District occurring as the result of the operation by such employee, within the scope of his office or employment, of a vehicle owned or controlled by the District: Provided, That in the case of a claim arising out of the operation of an emergency vehicle on an emergency run the District shall be liable only for gross negligence. Nothing contained in this Act shall be construed as depriving the District of any other defense in law or equity which it may have to any such action or give to any person, corporation, partnership, or association any right to institute or maintain any suit against the District which it did not have prior to the date of enactment hereof.

Sec. 4. The judgment in any such action shall constitute a complete bar to any action by the claimant by reason of the same subject matter against the employee of the District whose act or omission gave rise to the claim. No suit shall be instituted involving any claim described in section 3 unless the claimant shall have first given notice to the District in accordance with the Act of February 28, 1933 (47 Stat. 1370; sec. 12-208, D. C. Code, 1951 edition) and shall have presented to the District in writing a claim for money damages in connection therewith, and the District has had six months from the date of such filing within which to make final disposition of such claim. The administrative disposition of a claim by the District shall not be competent evidence of liability or amount of damages in proceedings on any such claim.

Sec. 5. In any case involving any claim described in section 3 in which the trial court shall consider the verdict excessive, the court may order a remittitur of so much of the amount of such verdict or judgment, as the case may be, as it considers excessive, and either permit the party in whose favor the verdict was rendered or the party recovering such judgment, as the case may be, to file a remittitur.

Sec. 6. After the effective date of this Act, no civil action or proceeding shall be brought or be maintained against an employee of the District for loss of or damage to property or for personal injury, including death, resulting from the operation by such employee of any vehicle if it be alleged in the complaint or develop in a later stage of the proceeding that the employee was acting within the scope of his office or employment, unless the District shall, in an action brought against it for such damage or injury, including death, specifically deny liability on the ground that the employee was not, at the time and place alleged, acting within the scope of his office or employment. If

in any such civil action or proceeding pending in a court in the District of Columbia as of the effective date of this Act the District has not been named as a defendant, said District shall be joined as a defendant and after its answer has been filed and subject to the provisions of the preceding sentence, the action shall be dismissed as to the employee and the case shall proceed as if the District had been a party defendant from the inception thereof.

Sec. 7. Nothing in this Act shall be construed so as to relieve any District employee from liability to the District for negligent damage to or loss of District property.

Sec. 8. This Act shall take effect thirty days after its enactment.

Approved July 14, 1960.

JOINT APPENDIX

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[Filed September 23, 1959]

IN THE MUNICIPAL COURT FOR THE DISTRICT OF COLUMBIA

GEORGE P. BARRICK
4713 Kansas Ave., N.W.
Washington, D. C.

and

ALLIED AMERICAN MUTUAL
FIRE INSURANCE COMPANY
a corporation
518 Mills Bldg.
Washington, D. C.

Plaintiffs

vs

GEORGE SWENSON
5324 Rock Church Road, N.E.
Washington, D. C.

Defendant.

Civil Action No. M-28211-'59

COMPLAINT

1. The plaintiff, George P. Barrick is an individual and the plaintiff, Allied American Mutual Fire Insurance Company, is a corporation doing business and with offices in the District of Columbia.

2. On, or about, January 18, 1959 at or near the 500 block of Decatur St., N.W., Washington, D. C. the defendant operated a vehicle in a careless and negligent manner and in violation of the traffic rules and regulations of the District of Columbia so as to cause the vehicle to collide with the individual plaintiff's parked vehicle, damaging the same in the sum of $147.82.

3. By reason of a policy of insurance betwen [sic] the individual plaintiff, George P. Barrick and the corporate plaintiff, Allied American Mutual Fire Insurance Company, the former paid the sum of $50.00 and the latter paid the sum of $97.82 towards the repairs of the vehicle of the individual plaintiff and by virtue of said contract and the performance of same, the latter became subrogated to this action in the full extent of its paid expenditures.

WHEREFORE, THE PREMISES CONSIDERED, the plaintiffs, George P. Barrick and Allied American Mutual Fire Insurance Company, a corporation, demand judgment of and against the defendant and each of them in the full sum of $147.82 plus costs of this suit and interest.

[Filed April 18, 1960]

ANSWER

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

The complaint does not state jurisdictional grounds.

Third Defense

1. The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered 1 of the complaint.

2. Defendant admits the occurrence of an accident on or about January 18, 1959, at or near the 500 block of Decatur Street, N.W., Washington, D. C., but denies all allegations of negligence.

Further answering paragraph 2 of the complaint, the defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations concerning damages.

3. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the complaint.

Further answering the complaint, the defendant denies all allegations not admitted or otherwise answered.

JURY DEMAND

Defendant demands trial by jury on all the issues herein.

PRE-TRIAL STATEMENT OF PLAINTIFFS

This is an action for property damage to the vehicle of the individual plaintiff in the sum of $147.82.

The accident occurred on January 18, 1959, when a vehicle operated by the defendant struck the plaintiff's parked vehicle in the 500 block of Decatur Street, N.W., Washington, D. C.

Plaintiffs allege that defendant was negligent as follows:

(1) failure to devote full time and attention to ones driving,

(2) failure to have vehicle under proper control to avoid striking a parked car,

(3) Unreasonable speed under the circumstances.

DEFENDANT'S PRE-TRIAL STATEMENT

The complaint fails to state a claim against the defendant upon which relief can be granted.

The defendant denies all allegations of negligence.

The District of Columbia requests leave of Court to avail itself discovery procedure as deemed necessary provided the trial of the case will not be unduly delayed thereby.

STIPULATION

Pertinent District of Columbia Traffic and Motor Vehicle Regulations to be admitted into evidence without formal proof.

PRE-TRIAL PROCEEDINGS

STATEMENT OF NATURE OF CASE:

This is an action for property damage only.

Pretrial statements of plaintiff and defendant are approved and incorporated in the pretrial order, subject to the following amendments and stipulations:

1. Discovery procedure may remain open provided it does not interfere with trial date.

2. Pertinent traffic regulations may be admitted without formal proof.

Defendant's pretrial statements is [sic] amended to include the defense of unavoidable accident.

Dated May 25, 1960

[Filed October 5, 1960]

MOTION OF DEFENDANT GEORGE SWENSON TO SUBSTITUTE

Through counsel, the defendant, George Swenson, moves the Court to substitute the District of Columbia Government as a party defendant in his stead, in the complaint filed herein on the ground that the maintenance of this action against him is prohibited by provisions of the Act of Congress approved July 14, 1960, 74 Stat. 519, which may be cited as the "District of Columbia non-liability Act."

ORDER OF OCTOBER 5, 1960

Judge Kelly

Motion of defendant George Swenson to substitute the District of Columbia as party defendant in its stead granted after oral argument and over objection that it deprives plaintiff of their right to bring action for ordinary rather than gross negligence thus depriving them of their remedy and that the statute is unconstitutional. Plaintiffs' oral motion to amend pre-trial order to allege gross negligence granted. Trial commenced. Defendant's motion for directed verdict made at close of plaintiff's case denied. Defendant's motion for directed verdict renewed at close of all evidence granted. Jury excused from further consideration of case. Trial completed.

JUDGMENT

October 11, 1960

Judge Kelly

Judgment on directed verdict for defendant.

[Filed October 14, 1960]

NOTICE OF APPEAL

Notice is hereby given that the plaintiffs, George P. Barrick, et al., appeal to The Municipal Court of Appeals for the District of Columbia from the judgment (order) of this court entered on the 11th day of October, 1960.

[Filed October 20, 1960]

STATEMENT OF ERRORS CLAIMED

The plaintiff appellant herein assigns as error committed by the Trial Court in the above entitled cause, the following:

1. The Court erred in granting defendant Swenson's Motion to Substitute the defendant District of Columbia under Public Law 86-654, 74 Stat. 519 in that said statute is unconstitutional and effectively deprives plaintiffs of their cause of action.

[Filed October 24, 1960]

STATEMENT OF PROCEEDINGS & EVIDENCE

This case arises out of an automobile collision which occurred on January 18, 1959 at the 500 block of Decatur Street, N.W., Washington, D.C. At the time of the collision the individual plaintiff's vehicle was parked when it was struck by a District of Columbia Fire Department Ambulance on an emergency run. The District vehicle was driven by George Swenson. The property damage to the individual plaintiff's vehicle in the sum of $147.82 was stipulated.

The plaintiffs instituted suit against the driver, George Swenson only.

Prior to the trial the defendant Swenson moved to substitute the defendant District of Columbia by virtue of the District of Columbia Employee non-Liability Act (Public Law 86-654; 74 Stat. 519). The motion to substitute was heard immediately prior to trial and was granted by the Court over plaintiffs' objection.

The case then proceeded to trial against the defendant District of Columbia only.

At trial the individual plaintiff testified that he parked his car on the evening of the accident and some time later he heard the collision,

went outside and saw the ambulance against his vehicle. The plaintiff then rested. Defendant moved for a directed verdict which was denied.

Defendant District of Columbia produced the driver of the ambulance and his assistant as witnesses. The driver stated he was driving the ambulance on Decatur Street on an emergency run at about 20 mph. Suddenly his ambulance skidded out of control and he struck the plaintiff's vehicle and also another parked vehicle (not involved here). The driver after the collision noted that the street at the point of collision was icy. He estimated the ice patch to be 25 feet in length and about the width of the street. The ambulance was still partially on the icy section after the collision. The driver did not see the ice prior to impact. He also stated he had been driving the ambulance during the day and had noted icy spots on other streets.

The driver's assistant recalled the sliding on the ice and estimated the ambulance's speed at 20 mph.

At the time of the collision a heart patient was in the ambulance.

After the conclusion of all the testimony defendant moved for a directed verdict on the grounds that plaintiffs had failed to prove gross negligence which under the District of Columbia Employee non-Liability Act the plaintiffs were so required (Cf. Section 3).

The Court granted defendant's motion on the grounds that gross negligence had not been proved.

Approved:

Catherine B. Kelly
Judge

11-8-60

[JUDGMENT OF THE MUNICIPAL COURT OF APPEALS]

Appeal from the Municipal Court for the District of Columbia, Civil Division. This cause came on to be heard on the Transcript of the record from the Municipal Court for the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Municipal Court, in this cause, be and the same is hereby, reversed with costs, and that this cause be and it is hereby remanded to the said Municipal Court. It is further ordered that appellants be given leave to proceed in their original suit against the ambulance driver.

Andrew M. Hood
Associate Judge

August 17, 1961

THE MUNICIPAL COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 2744

GEORGE P. BARRICK AND ALLIED AMERICAN MUTUAL FIRE INSURANCE COMPANY, a corporation, APPELLANTS.

v.

DISTRICT OF COLUMBIA, a municipal corporation, APPELLEE.

Appeal from The Municipal Court for the
District of Columbia
Civil Division

(Argued May 15, 1961 Decided August 17, 1961)

Francis X. Quinn, with whom Collins and Anderson was on the brief, for appellants.

Richard W. Barton, Assistant Corporation Counsel, with whom Chester H. Gray, Corporation Counsel, Milton D. Korman, Principal Assistant Corporation Counsel, and Hubert B. Pair, Assistant Corporation Counsel, were on the brief, for appellee.

Before HOOD and QUINN, Associate Judges, and CAYTON (Chief Judge, Retired) sitting by designation under Code § 11-776(b).

HOOD, Associate Judge: This appeal questions the constitutionality of the District of Columbia Employee Non-Liability Act.[1]

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[1] Pub. L. No. 86-654, 86th Cong., 2d Sess., 74 Stat. 519 (July 14, 1960).

On January 18, 1959, a District of Columbia Fire Department ambulance collided with an automobile owned by appellant Barrick and insured by appellant Allied American Mutual Fire Insurance Company. At the time of the accident the ambulance was on an emergency run. Appellants filed a negligence suit against the driver of the ambulance on September 23, 1959.

Before trial was held Congress passed the District of Columbia Employee Non-Liability Act which became effective on August 14, 1960. Under the new statute the District of Columbia can no longer assert the defense of governmental immunity in suits brought against it for money damages arising from the negligent operation of its vehicles. The statute, however, also provides that if a claim arises "out of the operation of an emergency vehicle on an emergency run," the District is liable only for gross negligence. After the effective date of the statute no action for the negligent operation of a District vehicle can be brought or maintained against a District employee acting within the scope of his employment. Furthermore--and this is the part of the statute under heaviest attack on this appeal--the Act contained the following language:

> If in any such civil action or proceeding pending in a court in the District of Columbia as of the effective date of this Act the District has not been

> named as a defendant, said District shall be joined as a defendant and after its answer has been filed and subject to the provisions of the preceding sentence, the action shall be dismissed as to the employee and the case shall proceed as if the District had been a party defendant from the inception thereof.

The present case came to trial on October 5, 1960, almost two months after the effective date of the D. C. Employee Non-Liability Act. At that time the defendant driver moved to substitute the District of Columbia as provided for in the Act. Over appellants' objection that they were being deprived of a vested right to prove ordinary negligence against the driver, the trial court granted the motion, dismissed the suit against the driver, and substituted the District as the new defendant. After the pre-trial order was amended to permit appellants to allege gross negligence, the trial commenced and resulted in a directed verdict for the District of Columbia.

Appellants argue that the judgment in favor of the District of Columbia should be set aside and they be allowed to proceed with their suit against the driver of the ambulance. In the first place, they seem to contend that Congress may not constitutionally pass legislation that prospectively takes away a right of action against an employee of the District, substituting for it a new cause of action against the District itself.

The Supreme Court, however, has stated that "the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object." Silver v. Silver, 280 U.S. 117, 122. See also Vogts v. Guerrette, Colo., 351 P. 2d 851. By passing the D. C. Employee Non-Liability Act Congress recognized the need to resolve the conflicting interests among District of Columbia employees, the District itself, and persons injured through the negligence of District employees acting within the scope of their employment.[2] We believe that the resolution of these conflicting interests was a "permissible legislative object," and we reject appellants' argument that the D. C. Employee Non-Liability Act is unconstitutional in its prospective operation.

The second argument advanced by appellants for allowing them to proceed against the ambulance driver is a more troublesome one, for it strikes directly at the constitutionality of the retroactive application of the D. C. Employee Non-Liability Act. Appellants point out that when the accident occurred on January 18, 1959, they were immediately vested with the common-law right to sue the driver and prove only ordinary

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[2] See S. Rep. No. 1815, 86th Cong., 2d Sess. (1960).

negligence against him to recover damages. By passage of the Act eighteen months after the accident occurred, however, they were divested of their right to sue the driver and forced to proceed against the District in a suit that required them to prove gross negligence. That the statute gave them a cause of action against the District of Columbia, they argue, does not make the retrospective application of the Act valid. Proving that the ambulance driver was guilty of ordinary negligence was one thing; demonstrating that the accident occurred through the gross negligence of the District was an entirely different matter which effectively deprived them of any chance of recovery.

As has been often noted, [3] the presumption is that a statute will not be applied retroactively unless the legislature has clearly indicated that it should have a retrospective effect. When such a legislative intent is clear, retroactivity by itself does not make a statute invalid.[4] Indeed,

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[3] See, e.g., Shawb v. Doyle, 258 U.S. 529; Kalis v. Leahy, 88 U.S. App. D.C. 166, 188 F. 2d 633, cert. denied 341 U.S. 926; Kindleberger v. Lincoln Nat. Bank of Washington, 81 U.S. App. D.C. 101, 155 F. 2d 281, 167 A.L.R. 1011, cert. denied 329 U.S. 803; 50 Am. Jur., Statutes § 478.

[4] See Kahn v. Wall, D.C. Mun. App., 68 A. 2d 862, and cases cited therein.

vested rights sometimes may be reached by retrospective legislation that is enacted as a reasonable exercise of the police power. Speert v. Morgenthau, 73 App. D.C. 70, 74, 116 F. 2d 301, 305. The general rule, however, is that "retrospective laws are unconstitutional if they disturb or destroy existing or vested rights, * * *." 16A C.J.S., Constitutional Law § 417 and cases cited therein; 2 Sutherland, Statutory Construction § 2205 (3d ed.1943); Gillioz v. Kincannon, 213 Ark. 1010, 214 S.W. 2d 212, 216.

Appellants' cause of action against the ambulance driver was a property right [5] that vested in them eighteen months before the passage of the D. C. Employee Non-Liability Act. Nevertheless, they were divested of their property right by the Act whose express terms, quoted above, made it effective in "any such civil action or proceeding pending in a court in the District of Columbia as of the effective date of this Act * * *." The mandate of the statute is so clear and unyielding that we cannot interpret it in any other way than that Congress intended it to apply retroactively

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5 "A right of action, * * *, is a vested property interest, * * *, at least 'where it comes into existence under common-law principles, and is not given by statute as a mere penalty or without equitable basis.'" Massa v. Nastri, 125 Conn. 144, 3 A. 2d 839, 840, 120 A.L.R. 939. See also Devlin v. Morse, 254 Mich. 113, 235 N.W. 812, 813.

as well as prospectively. [6]

We are next faced with the constitutionality of its retroactive effect on appellants' cause of action against the ambulance driver. The District of Columbia urges that the Act does not destroy a vested right because it replaces appellants' right to proceed against the District employee with a new remedy against the District. We cannot agree. There might be some merit to the government's argument if the Act merely affected remedies or procedure. See Chase Securities Corporation v. Donaldson, 325 U.S. 304; Hammack v. Monroe Street Lumber Company, 54 Wash. 2d 224, 339 P. 2d 684; Ogdon v. Gianakos, 415 Ill. 591, 114 N.E. 2d 686; 50 Am. Jur., Statutes § 482. But the Act does more than that. As was said by the court in Weil v. Taxicabs of Cincinnati, 139 Ohio St. 198,

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[6] There is dictum to the effect that when Congress plainly intends retroactive effect the courts are bound to that interpretation "unless to do so would result in a clear infraction of a constitutional provision." Kindleberger v. Lincoln National Bank of Washington, 81 U.S. App. D.C. 101, 106, 155 F. 2d 281, 286. But see 82 C.J.S., Statutes § 414 (p. 990). However, to interpret the D. C. Employee Non-Liability Act in a prospective manner only would distort the clear significance of its words. The Act is not written in a way that allows this court to deny that it was intended to be retroactive, as has been done by other courts with other statutes. See, e.g., Guerra De Chapa v. Allen, D.C.S.D. Tex., 119 F. Supp. 129; Hutchings v. Slemons, 141 Tex. 448, 174 S.W. 2d 487, 148 A.L.R. 1325.

39 N. E. 2d 148, 151, "If the statute created a right to compensation which did not theretofore exist, it was dealing with a new substantive right, and the fact that the legislation has the effect of extinguishing one type of right and creating another in lieu thereof, does not make it remedial legislation as to the rights involved." See also Field v. Witt Tire Co. of Atlanta, Ga., 2d Cir., 200 F. 2d 74; Martin v. Sasgen Derrick Company, 22 Conn. Sup. 219, 166 A. 2d 826; Michaud v. Fitzryk, Conn., 171 A. 2d 397.

As the effect of the D. C. Employee Non-Liability Act is to retroactively divest appellants of their common-law right of action to recover against the ambulance driver on proof of ordinary negligence and allows recovery against the District of Columbia only on proof of gross negligence, we are forced to declare that the Act in its application to the facts of this case results in an unconstitutional deprivation of appellants' property right.[7] Our holding has no application to the retroactive effect of the Act in cases which do not arise "out of the operation of an emergency vehicle on an emergency run," for in such cases the standard of care required of

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[7] Our ruling is in direct conflict with the memorandum opinion of Judge Youngdahl in Rohrlack v. Goff, D.C.D.C., Civil Action No. 2279-60, which was filed on June 30, 1961. We are unable to agree with the conclusion reached in that opinion.

the District of Columbia remains the same as that of its employees.

The judgment of the trial court is reversed, and it is ordered that appellants be given leave to proceed in their original suit against the ambulance driver.

BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,587

GEORGE SWENSON,

Appellant,

v.

GEORGE P. BARRICK
and
ALLIED AMERICAN MUTUAL FIRE INSURANCE COMPANY,

Appellees.

Appeal From The Municipal Court Of Appeals
For The District Of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 18 1962

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STATEMENT OF QUESTION PRESENTED

The Appellees believe the question stated by the Appellant is substantially correct.

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UNITED STATES COURT OF APPEALS

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No. 16,587

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BRIEF FOR APPELLEES

SUMMARY OF ARGUMENT

The District of Columbia Employee Non Liability Act as applied retrospectively to the facts of this case deprives the Appellees of a cause of action which vested some eighteen months prior to the Statute's enactment.

Since the Appellees' prior cause of action was a vested right, it cannot be divested by the legislature unless an adequate remedy is substituted. The Act, as applied to this case, left the Appellees without any remedy whatsoever.

ARGUMENT

The real and only question presented in this appeal is whether an existing cause of action can be divested, withdrawn or destroyed by legislative action.

Prior to the enactment of the District of Columbia Employee Non-Liability Act, the Appellees had a cause of action against the District of Columbia employee operating the District vehicle at the time of the collision in question. This action, based on ordinary negligence, existed regardless of whether the employee was operating the District vehicle on an emergency run.

Assuming the existence of this cause of action, is it of such a nature that it cannot be divested, withdrawn or destroyed?

Appellees argue that their original cause of action was a vested right of which they cannot be divested.

In 11 Am Jur §377, it is noted:

> A cause of action is a vested right and is property in the same sense in which tangible things are property and is equally protected against arbitrary interference and whether it springs from contract or from the principles of the common law the legislature may not take it away.

In Gibbes v. Zimmermann, 290 US 326, it is stated at page 332,

> But although a vested cause of action is property and is protected from arbitrary interference (Pritchard v. Norton, 106 US 124, 132) . . . all that he is guaranteed by the 14th Amendment is the preservation of his substantial right to redress by some effective procedure.

The Municipal Court of Appeals recognized that appellees had a cause of action against the ambulance driver that was a property right that vested eighteen months before the passage of the D. C. Employee Non-Liability Act. (Cf. J.A. pg. 17).

As further authority for this proposition, the Municipal Court of Appeals stated:

> A right of action, . . . , is a vested property interest, . . . , at least where it comes into existence under common-law principles, and is not given by statute as a mere penalty or without equitable basis. (Massa v. Nastri, 125 Conn. 144, 3 A 2d 839, 840, 120 A.L.R. 939. See also Devlin v. Morse, 254 Mich. 113, 235 N.W. 812, 813.)

That appellees had a common law right of action sounding in tort against the District's employee has not been questioned. The appellant in his brief, seemingly concedes the existence of a vested right and apparently argues that such rights can be divested as long as there is a substitution of remedy, regardless of its adequacy.

In Gallegher v. Davis, 183 A 620 (Delaware 1936), the power of the legislature to abolish a cause of action is discussed.

> Generally we think the provision is inserted in Constitutions to secure the citizen against unreasonable and arbitrary deprivation of rights whether relating to life, liberty, property or fundamental rights of action relating to person or property, and that it applies as well to the judicial branch of government as to the legislative and executive branches. It embraces the principle of natural justice that in a free government every man should have an adequate legal remedy for injury done him by another. (emphasis added)

Under the provision of the D. C. Employee Non-Liability Act, the appellees' cause of action is abolished as to the employee, suit is allowed against the District and appellees must prove gross negligence to prevail. (Cf. Sections 3 & 6 of Act - Appendix A, Appellant's Brief). There is no longer a remedy upon proof of ordinary negligence.

Appellees contend that the abolition of their prior remedy against the employee constitutes a denial of due process as provided by the United States Constitution.

The above contention necessarily involves a consideration of the power of the legislature to either abolish or otherwise alter a vested right of action.

In Ritholz v. March, 70 App DC 283, the rule as to legislative activity in this area was stated in a negative sense at page 285:

> So long as a substantial and efficient remedy remains or is provided, due process of law is not denied by a legislative change . . . .

The legislative branch is restricted by the guaranty of the 5th Amendment that the substantial right to redress by some effective procedure must be preserved. If the legislature destroys vested rights of action then the due process clause is violated. Cf. 11 Am Jur §377 and cases cited.

The particular question here is succinctly expressed by certain quoted remarks of the trial judge appearing in the opinion in the case of Batdorff v. Oregon City, 100 Pac 937 at page 938:

> I don't believe that this clause in the charter of Oregon City exempting the city from damages for negligence and allowing a recovery only against the councilmen for gross or wilful negligence is constitutional. I don't think the Legislative can take away plaintiff's common law remedy against the City for ordinary negligence and substitute for that a partial remedy against the councilman for gross or wilful negligence. It attempts to take away a complete remedy and substitute therefor a partial and emasculated remedy. This is unconstitutional and wrong.

The Batdorff case, which involved a statute quite similar to the present one, and other cases are discussed in the annotation at 36 ALR 1400.

The significant feature of the cases in this field is the availability of remedy. If the statute in question exempts the municipality there must be redress against the individual. This then becomes the real and only test of constitutionality. Assume an existing legal remedy, assume a change in this remedy. If this new remedy does not deprive the litigant of his redress it is constitutional. But if it denies him a remedy or gives only partial redress in certain situations it is unconstitutional.

The Municipal Court of Appeals recognized that appellees had been divested of their common-law right of action against the employee sounding in ordinary negligence. It further recognized that the only remedy substituted was an action requiring proof of gross negligence against the District. If the above two propositions are placed beside one another and so considered, the denial of due process becomes obvious. The Act has not provided a new remedy but rather in this case it has completely and effectively eradicated a vested right.

One final consideration is the appellant's consistent statement that the Act gives the appellees "something of value". By stripping the legal niceties from this argument and considering the facts as conceded appellant knows full well that gross negligence could never be proved in this case. He further knows that a judgment against the employee would not be worthless. These considerations remove all the effect of the appellant's argument that the Act "gives to a claimant something of real value which he did not previously have, while taking from him nothing of value which he had prior to the effective date of the Act."

Actually, the Act does just the opposite of what the appellant suggests. It takes away his cause of action against the employee and substitutes absolutely nothing - the Municipal Court has already ruled that appellees failed to prove negligence in this case.

CONCLUSION

Appellees suggest that the decision of the Municipal Court of Appeals correctly followed the law of the case and its decision should be affirmed.

Respectfully submitted,

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